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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1176

EXXON CORPORATION AND
KERR-MCGEE CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respectfully submitted,

ROBERTS B. OWEN
888 16th St., N.W.
Washington, D.C. 20006

Of Counsel:
Steven S. Rosenthal
Patrick M. Norton
Covington & Burling
888 16th St., N.W.
Washington, D.C. 20006

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The two petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered October 19, 1978, affirming the dismissal by the United States District Court for the District of Columbia of petitioners' Amended Complaints.

OPINIONS BELOW

The District Court dismissed petitioners' Amended Complaints by an order without written opinion dated March 29, 1977 (App. 1a). The Court of Appeals for

the District of Columbia Circuit affirmed the foregoing dismissal in an opinion which has not been officially reported but is set forth in the Appendix (App. 3a-24a).[1]

On December 6, 1978, when the Court of Appeals denied petitioners' request for rehearing and suggestion of a rehearing *en banc*, one of the judges of that court (Wilkey, J.) filed a dissenting opinion which is printed in the Appendix (at 28a-30a). As also reflected in the Appendix (at 27a), an additional judge (Bazelon, J.) noted, without opinion, his view that the court should have reheard the case *en banc* because of the importance of the issue involved.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1978, and a timely petition for rehearing was denied on December 6, 1978 (App. 25a-26a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a private person or entity has been compelled to turn over confidential information to a Federal agency, and where someone connected with Congress (*e.g.*, an individual member of Congress or a Congressional committee chairperson) then asks the agency to disclose the confidential information, does

[1] Petitioners' applications for a stay pending their appeal to the Court of Appeals were denied by the District Court (on March 29, 1977), by the Court of Appeals (on May 6, 1977), and by the Chief Justice of the United States (on May 23, 1977). None of these orders was accompanied by an opinion.

the agency have unfettered power (as held by the court below) to make the requested disclosure *without* giving the owner of the information advance notice and an opportunity to seek judicial relief—or does the Due Process Clause (as petitioners contend) require the agency to give sufficient advance notice to allow the owner to get to court and obtain any judicial relief to which he may be entitled?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), provides in relevant part that the Federal Trade Commission shall have power

> "(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest . . ."

STATEMENT OF THE CASE

In recent years hundreds of Federal agencies have been making ever-increasing demands that private individuals and companies turn over to the agencies enormous volumes of information of a kind traditionally regarded as confidential. At the same time members of Congress and their staffs, conscious of this vast reservoir of information, have been making ever-

increasing demands upon such agencies for information about private individuals and companies, to the point where the volume of "congressional demands for access to confidential data" (according to the chief of the agency involved in this case) has become a major problem for the agencies involved.[2] Petitioners here are seeking to establish that any person—whether a private citizen or a private company—has an affirmative right to be notified by such an agency in advance of any proposed disclosure of his confidential information so that he can obtain judicial review of the propriety of the disclosure before it occurs. The principle at issue, which derives directly from a holding of this Court in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), affects not only commercial interests of the kind involved in this case; it affects the interests of a vast class of individuals whose personal, political and associational activities are documented in the confidential files of Federal agencies, and it also has serious implications with respect to governmental "secrets" which may be of interest to Congress.

1. The Facts

In 1975 the Federal Trade Commission served upon various companies involved in the uranium industry a comprehensive investigative subpoena. In response a number of companies, including these two petitioners (Exxon Corporation and Kerr-McGee Corporation), turned over to the Commission a large volume of detailed and competitively-sensitive information. As accurately observed by the Court of Appeals below,

> "It is undisputed that some of this material involved trade secrets, particularly the data concerning the production and projected yield of individual mines." (App. at 6a).

Thereafter the Commission received from various individual Congressmen a number of requests for information relating to the uranium industry; this record contains seven letters from seven different members of Congress, each seeking one kind of uranium information or another.[3] One of those seven requests posed a threat to the confidentiality of the commercial data which petitioners have considered particularly sensitive, namely, "the production and projected yield of individual mines."

That request consisted of a letter written on April 30, 1976, by the late Senator Philip Hart "on official stationery of the Senate Judiciary Subcommittee on Antitrust and Monpoly requesting the Commission to make available all information it had concerning the coal and uranium holdings of the oil companies" (App. at 6a). In early May the undersigned counsel for Exxon and Kerr-McGee were informed that Senator Hart's letter had been received by the Commission but were simultaneously told that the Commission

[2] See Testimony of Michael Pertschuk, Chairman, Federal Trade Commission, in *Hearings on Oversight of Antitrust Enforcement Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. at 27 (1977).

[3] Four of the letters appear in the Joint Appendix below (J.A. 60, 61, 62, 93), and three additional letters appear as appendices to the "Reply Brief of Appellant Exxon Corporation" (Appendices A, B and C) as filed in the court below.

had not yet decided whether to honor the request. Accordingly, counsel took no action at that time.

On May 10, 1976, however, at approximately 3 o'clock in the afternoon, a member of the FTC staff orally notified the undersigned counsel (a) that at 2 p.m. the following day (May 11, 1976) some unidentified staff employees of Senator Hart's subcommittee were going to visit the FTC's offices and (b) that the Commission, in response to Senator Hart's letter, had decided that at that time the visitors would be given access to all of the information which petitioners had submitted under compulsory process to the FTC.

Petitioners were in fact concerned about the confidentiality of a very limited amount of data. Specifically, petitioners understood the interest of Senator Hart's subcommittee in each oil company's total coal and uranium reserves and had no objection to the Commission's disclosing such figures, but petitioners could see nothing to indicate that Senator Hart's subcommittee had any interest in competitively-sensitive data relating to individual uranium mines. Since it thus appeared to the petitioners that the FTC staff was preparing, 23 hours later, to disclose to unidentified staff personnel highly confidential information which did not appear to be wanted by the subcommittee itself, petitioners decided to seek judicial relief in the 23 hours allowed to them by the Commission.

They barely succeeded. Within that 23-hour period petitioners' counsel consulted with their clients, prepared complaints and motions for temporary injunctive relief, assembled the affidavit support needed for such motions, and filed the assembled papers in the

District Court for the District of Columbia.[4] Temporary injunctive orders were issued a few minutes before 2 p.m. on May 11, 1976.

After the initial rush to obtain temporary injunctive relief it occurred to the petitioners that new Congressional requests for their confidential data might be forthcoming in the future and that, as matters then stood, there was nothing to prevent the FTC from disclosing petitioners' data without giving petitioners any adequate opportunity to object or to seek judicial relief. Indeed, the Commission had notified petitioners that, if Congressional requests for the information were received by the FTC, the Commission would give petitioners "as much advance notice [of any proposed disclosure] as can reasonably be given" in the circumstances, but the Commission had refused (and still refuses to this day) to commit itself to give sufficient advance notice to allow the owner of confidential information to get to court and obtain whatever judicial relief might be appropriate in the circumstances.[5]

Accordingly, in their Amended Complaints petitioners sought a judicial declaration to the effect that a reasonable amount of pre-disclosure advance notice (so as to afford each petitioner "a fair and reasonable opportunity to protect its proprietary interests") is

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[4] The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1361, 1651, 2201 and 2202 and 5 U.S.C. §§ 701-706.

[5] The Commission's position was set forth in letters sent to petitioners (and appended to their Amended Complaints). As correctly noted in the opinion below, "[t]he FTC admits that it fully intends to hold open the option of disclosing trade secrets in the future without the safeguards sought by [petitioners]." App. 9a, n.10.

mandatory.[6] When the FTC moved to dismiss this "advance notice" claim for failure to state a claim upon which relief could be granted, Judge Pratt of the District Court granted the motion, and a three-judge panel of the Court of Appeals (per MacKinnon, Robb, and Robinson, JJ.) affirmed.[7]

2. The Opinions Below

In the court below Judge MacKinnon wrote an opinion for the three-judge panel which decided the case. Thereafter, when petitioners suggested a rehearing *en banc* (which could be granted only if five of the nine judges in regular active service voted in favor thereof), two judges (Tamm and McGowan, JJ.) recused themselves. Three others (those on the panel) had already passed on the merits, leaving four judges to consider the matter afresh. Those four split evenly on the rehearing question, with two voting against (Wright, C.J., and Leventhal, J.) and two voting for rehearing *en banc.* Judge Bazelon voted to rehear the case *en banc* in order to allow the court "to consider the important questions this case raises under *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975)", and Judge Wilkey wrote a three-page "statement . . . as to why he voted for rehearing *en banc*", expressing strong disagreement with the panel's opinion and stressing certain factors "commending the case for certiorari review." (App. 28a-30a). The contrast between the opinions of Judges MacKinnon and Wilkey not only frames the issue for which certiorari review is now sought but also emphasizes its great importance in terms of constitutional rights.

[6] See, *e.g.*, petitioner Exxon Corporation's "Amended Complaint for Injunctive and Declaratory Relief", Count II.

[7] As previously noted (at p. 2, n. 1), petitioners unsuccessfully sought stays pending appeal, but the denial of that relief has not as yet resulted in disclosure of the confidential information. Petitioners have been advised by the FTC staff that they have not yet revealed the controversial data, but the threat of such disclosure obviously remains.

Looking first to the panel opinion, it laid down one basic proposition as to which certiorari review is *not* sought by these petitioners. In Part V of its opinion (App. 18a-23a) the panel held, quite properly, that with respect to informational requests from Capitol Hill Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f)—which excludes "trade secrets" from the information which the Commission may properly "make public"—imposes upon the FTC a statutory duty *not* to "disclose trade secrets except upon legally authorized requests" from Congressional *committees,* as distinguished from requests from "individual Congressmen" (App. 21a-22a). When the FTC receives a request which purports to have been authorized by a Congressional committee, the FTC has a duty "to verify" the "fact" of authorization "before delivery" (*id.*); it must "take steps to ascertain the validity" of the request (*id.* at 21a) by satisfying itself that the request (whether in the form of a subpoena or otherwise) has been "authorized" by a committee or subcommittee of Congress (*id.* at 22a) and is not simply a request by an individual Congressman (*id.* at 21a). Since neither the petitioners nor the FTC have ever voiced any disagreement with this basic principle, the court below and the parties are agreed that the owner of trade secret information in the hands of the FTC has an affirmative statutory right to have that information protected from disclosure pursuant

to a request which emanates from Capitol Hill but which has not been properly "authorized" by a congressional committee.[8]

Once the panel had confirmed the existence of such substantive rights on the part of the owners of "trade secret" information, petitioners would have expected the panel to hold that, whenever the FTC receives an informational request from Capitol Hill and plans to honor it as being "legally authorized", it must notify the owner of any affected confidential information of the Commission's intentions in order to allow him, if appropriate, to obtain judicial review of the Commission's determination that the request was "legally authorized" (see App. 22a). In their briefs to the panel the petitioners had urged vigorously that under this Court's decision in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975), persons in petitioners' position have a clear right to judicial review of the propriety of such a Congressional request for information in the hands of a third party and that that right to judicial review can be exercised in fact only if the affected party has advance notice of a proposed disclosure.

Nevertheless, the panel, without ever referring to the cited *Eastland* holding,[9] flatly refused "to mandate" that the owner of confidential information be

[8] In subsequent litigation the FTC has characterized the decision below as "based on the premise" that petitioners "have a protectible proprietary interest" in the trade secrets they have made available to the FTC. "Memorandum [of the FTC] in Support of Request for Reconsideration of October 18, 1978 Opinion", as filed in *Wearly* v. *Federal Trade Commission* (D. N.J. Civ. Action No. 77-1860) at 16.

[9] As noted by Judge Wilkey, the panel's opinion referred to other aspects of this Court's *Eastland* decision but not to the

given any degree of advance notice of a proposed disclosure so that he can in fact avail himself of his right to judicial review (see App. 10a-15a).[10] In the words of Judge Wilkey,

> ". . .strangely the court winds up holding that the agency need not give the private party any advance notice of a proposed disclosure—a holding which thus effectively precludes any judicial review of the legal issue of whether disclosure is proper. *The panel thus recognizes the private parties' substantive and procedural rights, but simultaneously renders them totally unenforceable and meaningless.*" (App. 29a, emphasis added).

Certiorari review is sought for the above-cited holding, which appears in Part II of the decision below (App. 10a-15a).

REASONS FOR GRANTING THE WRIT

I.

The Challenged Holding Conflicts Not Only With A Recent Decision Of This Court But Also With Due Process, Logic, And Other Decisions Of The Court Below

The controlling decision of this Court, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491

holding relating to the present issue (App. 29a). Ironically, as noted below, the portion of this Court's *Eastland* opinion upon which petitioners have relied affirmed a holding of the Court of Appeals for the District of Columbia Circuit.

[10] Petitioners had sought a declaratory judgment to the effect that the FTC must provide either ten days' advance warning or at least sufficient advance notice to allow the affected party to get to court, but the panel explicitly "decline[d] to impose on the Commission either an unqualified ten-day warning requirement or the more flexible alternative of mandating simply 'reasonable prior notice.' " (App. at 13a, n.15.)

(1975), was rendered in a case which also came here from the Court of Appeals for the District of Columbia Circuit. In *Eastland* this same court of appeals held that, where a private organization has given confidential information to a third party (there a bank), and where a Congressional demand for the information has been made to that third party, the owner of the information has an affirmative right to bring an action in the Federal courts to test the propriety of the Congressional demand. *United States Servicemen's Fund* v. *Eastland*, 159 U.S. App. D.C. 352, 359-360, 488 F.2d 1252, 1259-1260 (1973). Although this Court subsequently disagreed with other rulings made by the Court of Appeals in the same case, it explicitly stated that the court below had "correctly held" that the owner of the confidential information had a right to judicial review of the Congressional request and that "compliance by the third person" with the request should not be permitted to "frustrate any judicial inquiry." 491 U.S. at 501, n.14.

Despite its own prior *Eastland* ruling and this Court's affirmance thereof, the panel below has now held that "the third person" (here the FTC) *is* entitled (to paraphrase this Court's words) "to frustrate any judicial inquiry" by revealing confidential information in response to a Congressional demand without giving the owner any opportunity for judicial review. Petitioners respectfully submit that Part II of the panel's opinion (App. 10a-15a) unquestionably conflicts with the important principle confirmed by this Court in *Eastland*.[11]

[11] The point has been forcefully made by Judge Wilkey:

> "While the panel's decision discusses *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), it nowhere confronts the holding of *Eastland* that where a Congressional subpoena has been issued for information relating to a private party, but which is in the possession of another entity, the affected private party has an affirmative right to judicial review of the Congressional request *before* disclosure is made. 421 U.S. at 496, n.9, and 501, n.14. Under the panel's strange rationale, while the right to judicial review of the propriety of the Congressional action is recognized, just as it was in *Eastland*, the panel destroys the right to the judicial review it recognizes and which was granted in *Eastland* by its illogical holding that *the private party affected has no right to notice which would enable him to seek judicial review.*" (App. 29a-30a; emphasis in the original.)

It also squarely conflicts with Due Process, logic, and other decisions of the courts of appeals, including those of the D.C. Circuit itself. Over the years this Court has repeatedly emphasized the perfectly obvious proposition that the Due Process right to a judicial hearing includes the right to enough advance notice to enable the affected party to get to court, simply because the right to a hearing has no "reality or worth" without such notice. *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950); see also *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971); *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82 (1972); *Goss* v. *Lopez*, 419 U.S. 565, 579 (1975); *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976). The panel opinion below simply refused to recognize that petitioners' "protectable proprietary interest in [their] confidential information"[12] was being stripped of its protection by the panel's decision to allow Federal agencies to dispense with the advance notice so plainly required by Due Process.

The ruling below is particularly "perplexing" (to use Judge Wilkey's adjective) in the light of the same

[12] The quoted phrase is that of the Federal Trade Commission. See p.10, n. 8, *supra*.

court's even more recent decision in *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Commission*, ___ U.S. App. D.C. ___, ___ F.2d ___ (D.C. Cir. No. 75-2059, Dec. 22, 1978). There the court emphasized, with voluminous citations, the fact that Government agencies accumulate all kinds of confidential information about "little people" (including information about marital status, legitimacy of children, identities of fathers, alcoholic consumption, family fights, etc.) and that "it would be folly to entrust" the decision whether or not to disclose such private information under the Freedom of Information Act "to unreviewable bureaucratic discretion" (Slip Op. at 9-10 and n.27). Although the opinion (which was written by a member of the panel in this case) does not explicitly mention procedural Due Process, that was clearly the source of the principle invoked:

> "Surely these individuals should not be without recourse to judicial review of agency action so deeply affecting their privacy." (*Id.*)[13]

Similarly, in a case which is pending before this Court on other issues, *Chrysler Corp.* v. *Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *cert. granted sub nom. Chrysler Corp.* v. *Brown*, 435 U.S. 914 (1978), the Court of Appeals for the Third Circuit held that as a matter of Due Process a private party whose confi-

[13] As to Congressional requests for such private information, this Court held a century ago that under the Constitution Congress does not possess "the general power of making inquiry into the private affairs of the citizen." *Kilbourn* v. *Thompson*, 103 U.S. 168, 190 (1880), cited with approval in *McGrain* v. *Daugherty*, 273 U.S. 135, 173 (1927), and *Eastland, supra*, 421 U.S. at 504, n.15.

dential information is sought from a Federal agency under the Freedom of Information Act must have some opportunity for judicial review before disclosure. As the court there observed, "Judicial review of agency action must be available at a meaningful time . . . [D]isclosure would render moot any judicial review . . ." 565 F.2d at 1193.[14]

Finally, this last quite obvious point—that an opportunity for judicial review must be provided before actual disclosure—has been explicitly recognized by the D.C. Circuit itself; indeed, in one prior case the court *en banc* ordered the Federal Trade Commission to give the owner of confidential information "ten days' advance notice of its intention" to disclose the information to Congress and explicitly recognized that such notice was needed in order to "provide an opportunity for judicial review at some later date if [the owner believes] that a particular proposed disclosure is improper." *Federal Trade Commission* v. *Texaco, Inc.*, 180 U.S. App. D.C. 390, 412-13, 555 F.2d 862, 884-885 (D.C. Cir. *en banc*), *cert. denied*, 431 U.S. 974 (1977).[15]

Petitioners respectfully submit that the point is so obvious, and the error in the panel's ruling so plain, that summary reversal now would be entirely justified.

[14] The quoted language was directly addressed to the issue of finality of agency action but is equally applicable here.

[15] In entering the above-described order the court stated that it was "not herein adopting a rule of general applicability for a ten-day notice provision", 555 F.2d at 884, n.64, but the significant point is that in entering the order in *Texaco* the court recognized (as the panel failed to do in this case) that without advance notice there can be no "opportunity for judicial review."

II.

As Recognized By The Court Below, The Issue For Which Certiorari Review Is Now Sought Involves Important Constitutional Questions Affecting Legislative Powers And Private Rights, And The Issue Should Be Resolved By This Court

The basic rationale employed by the panel in refusing to require the FTC to afford an opportunity for judicial review of Congressional information requests was that, although it would be a "rarity" for Congress to issue a "forthwith subpoena" calling for "immediate disclosure" of confidential information, nevertheless Congress has constitutional authority to issue such subpoenas and that for the court "to mandate any enforced delay" in complying with such a subpoena "would be of highly questionable constitutionality." (App. 11a and n.12). Petitioners respectfully disagree.[16] For present purposes, however, the important point is that the panel views the issue as one directly involving the constitutional power of Congress to investigate. See App. 11a.

[16] We disagree for several reasons:

(1) As the panel itself recognized, a "forthwith subpoena" is just as capable of being invalid as any other subpoena. The panel has held in effect that an agency served with a forthwith subpoena is entitled to immunize it from judicial review (by failing to give any notice to the affected private party), even if the subpoena is invalid, but that cannot be the law.

(2) Even the panel recognizes that, where an agency has received a Congressional request (either in the form of a forthwith subpoena or otherwise), there must be some delay in compliance because (in the panel's words) the agency must take the time needed "to ascertain the validity" of the request and "verify" the underlying authorization "before delivery" of the requested information (App. 21a-22a).

(3) None of the requests reflected in the present record were embodied in subpoenas, forthwith or otherwise. Even if the panel were correct in holding that it would be unconstitutional for a court to require a Federal agency to delay compliance with a forthwith subpoena, that rationale can hardly justify the panel's refusal to require advance notice before compliance with other types of Congressional requests.

At the same time, the issue directly involves the protection of private constitutional rights. As emphasized by Judge Wilkey, the panel's ruling is not confined to the trade secrets of oil companies; on the contrary,

> "The rule laid down by the panel is a general rule on the authority of Congressional committees to request and obtain from any federal agency confidential information furnished to it by a private party. This rule permitting disclosure without any notice whatsoever is equally applicable to all kinds of information protected from disclosure by any one of numerous constitutional and statutory provisions. Congress' and the courts' oft expressed concern for privacy, for example, would be completely vitiated by this general rule." (App. 29a).

The "privacy" implications of the ruling below can be illustrated by reference, again, to the opinion of the court below in *Consumers Union of the United States, supra.* As noted above (at p. 14), that opinion detailed the great variety of intensely personal information which private individuals are routinely required to turn over to Federal agencies, and yet the panel in this case has held that any such agency can make such information available to Congressional personnel without giving the affected private party any

opportunity for impartial review of the propriety of the disclosure. From the perspective of private individuals, we submit, the constitutional importance of the issue is plain.

Moreover, the ruling below—allowing a party with a substantive right to be stripped of the remedy that would make the right meaningful—poses a threat to the interests of the Federal Government itself. For example, in other litigation in the court below the Department of Justice has been maintaining that, where a private company possesses national security information and receives a Congressional demand for disclosure, the Executive Branch of the Federal Government has a substantive constitutional right to have the private company withhold the information from Congress,[17] and the court has confirmed the ancillary equitable right of the Federal Government to a judicial hearing, to injunctive relief[18]—and, as an unstated but necessarily-implied corollary, to advance notice of a threatened disclosure so that the substantive public right can be protected.[19] The notion advanced below that the possessor of confidential information has no advance-notice obligation to the "own-

[17] *United States* v. *American Tel. & Tel. Co.*, 179 U.S. App. D.C. 198, 203, 551 F.2d 384, 389 (D.C. Cir. 1976).

[18] *United States* v. *American Tel. & Tel. Co.*, 185 U.S. App. D.C. 254, 262, 567 F.2d 121, 129 (D.C. Cir. 1977).

[19] As noted in the text, in such a situation the right to advance notice arises, not from the Due Process Clause (which presumably does not protect the interests of the public as against private action), but rather as a necessary corollary to the substantive public right and the right to a remedy to protect it. Similarly, in the instant case the petitioners' "protectable" substantive rights (see p. 10, n. 8 and p. 13, *supra*) give them a right to advance notice, quite apart from the Due Process Clause, although in this context the clause reinforces that right.

er" poses a substantial threat to the interests of all such owners, private and public alike. For this additional reason, we submit, certiorari should be granted.

Finally, certiorari review would be appropriate even if nothing more than purely commercial interests were at stake. In *Chrysler Corp.* v. *Brown, supra*, this Court has granted certiorari in order (in part) to determine the proper scope of the judicial review that will be available to a private company which is seeking to protect its trade secrets from disclosure by a Federal agency under the Freedom of Information Act. There it has been an accepted premise that some degree of pre-disclosure judicial review must be made available; the only issue is whether the review will be *de novo*. In this case, however, the issue is whether there must be judicial review at all. In short, the issue here is even more fundamental than the related issue to be reviewed in *Chrysler*, and the reasons for granting certiorari are even more compelling.

We respectfully submit that Judge Wilkey was plainly correct in his observation that the rule adopted below "strikes down the protection of judicial review where constitutional rights are affected" and that the case involves a fundamentally important issue calling "for certiorari review" (App. 28a, 30a).

III.

The Case Presents An Important Issue Which Is Bound To Recur In A Variety Of Contexts And Which Thus Calls For Immediate Resolution By This Court

The respondent's principal spokesman, Chairman Pertschuck of the FTC, has testified to the recurring

nature of "congressional demands for access to confidential data" in the hands of the FTC (see p. 4, *supra*), and there is no reason to believe that other Federal agencies have had any different experience. Moreover, the AT&T litigation in the court below (see page 18, *supra*) confirms that Congress also makes demands for governmental information in the possession of private parties. Some of these demands, of course, are made by Congressional committees, but some, as recognized by the panel below, consist of "casual requests of individual Congressmen" (App. at 21a).

The risk of subsequent disclosure by Congressmen has long been recognized. In this very case the court below has held that the "divulgement" of trade secrets to individual Congressmen is forbidden by statute, obviously because of the risk that such Congressmen will make further disclosures (App. at 21a-22a),[20] and, as noted in the same AT&T litigation, the President of the United States regards the submission of national security information to a Congressional *committee* as creating "unacceptable risks of disclosure" by the committee itself.[21] In view of the possibility of "leaks", either by individual Congressmen[22] or by

[20] See, *e.g.*, the following statement in the panel's opinion (at App. 20a-21a):

> "Election [of an individual] to the Congress does not give an individual subpoena power over whatever information he may happen to be interested in, and particularly not over trade secrets, whose oftentimes enormous value may be forfeited by *disclosure to the public.*" (Emphasis added).

[21] *United States* v. *American Tel. & Tel. Co.*, 179 U.S. App D.C. 198, 202, 551 F.2d 384, 388 (D.C. Cir. 1976).

[22] As recently noted by the District Court below (per Gesell, J.) in *FTC* v. *Owens-Corning Fiberglas Corporation* (D.D.C. No. 78-0313), when confidential information is delivered to a Congressman, it frequently happens that the information is "in the newspapers by the afternoon" (Transcript of Proceedings, Dec. 15, 1978, at 93-94).

Congressional committees,[23] every transfer of confidential information, whether public or private, to Congress raises a clear potential danger to the public or private interest involved.

The panel's ruling below leaves every entity which possesses such information free to "moot" the question of the propriety of a disclosure in every case if it wants to do so (simply by making the disclosure without advance notice), and it is therefore important that this Court come to grips with this recurring and troublesome issue now.[24] Since the issue directly affects the rights of every "owner" of confidential information—whether a private citizen, a private company or a public body—and since the issue is well "beyond the

[23] See *United States* v. *American Tel. & Tel. Co.* 179 U.S. App. D.C. 198, 208, 551 F.2d 384, 394 (D.C. Cir. 1976).

[24] The panel characterized the issue as "only an incipient controversy" (App. 10a), apparently on the theory that disclosure of petitioners' trade secrets to Senator Hart's Subcommittee on Antitrust and Monopoly would not necessarily cause harm (*id.* at 12a-13a). But the panel's newly-adopted principle (leaving every agency free to omit advance notice of disclosure) applies not simply to the specific request made by that subcommittee but to all future Congressional requests, without regard to their propriety. The only way that the present controversy could be more concrete would be if the FTC had already disclosed petitioners' trade secrets to someone on Capital Hill (as it has not yet done, see p. 8, n. 7, *supra*), and in such circumstances the FTC would doubtless be arguing now that the case was moot and non-justiciable (see p. 15, *supra*). The controversy is no more "incipient" than a proposed merger of the kind so frequently challenged in litigation by the FTC.

academic or the episodic",[25] it should be resolved by this Court in this case.[26]

CONCLUSION

The instant petition, which presents a single constitutional issue which is both remarkably simple and remarkably important, should be granted.

Respectfully submitted,

ROBERTS B. OWEN
888 16th St., N.W.
Washington, D.C. 20006

Of Counsel:
Steven S. Rosenthal
Patrick M. Norton
Covington & Burling
888 16th St., N.W.
Washington, D.C. 20006

[25] See *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

[26] The opinion below is plainly incorrect in suggesting that the relief requested—a simple ruling as to the requirement of advance notice—would constitute an impermissible judicial interference with administrative discretion (see App. 11a, 14a-15a). That is akin to saying that, where the law requires an administrative agency to afford a hearing and an agency is threatening to proceed without one, the Federal courts should not inject themselves into the controversy because a declaratory judgment requiring a hearing would interfere with the agency's broad discretion as to how hearings should be conducted.

APPENDIX

United States District Court
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0812

EXXON CORPORATION,
Plaintiff,

v.

FEDERAL TRADE COMMISSION, et al.,
Defendants.

Order

Upon consideration of the complaint; the Motions of Plaintiff for a Preliminary Injunction and for Partial Summary Judment; the Motion of Defendants to Dismiss the Action; the Statements of Points and Authorities and argument of counsel in support thereof and in opposition thereto; it appearing to the Court that the Federal Trade Commission has authority, in response to an official request or subpoena of Congress, to transmit confidential commercial information and trade secrets to Congress without affording ten days prior notice to the party which supplied such confidential information and trade secrets to the Commission;[1] that such transmission does not con-

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[1] We are not unmindful of footnote 63 of the Court of Appeals opinion in *F.T.C.* v. *Texaco*, No. 74-1547, decided *en banc*, February 23, 1977 (slip opinion p. 43). However, we believe that action to be legally and factually distinguishable from the case at bar.

stitute public disclosure within the meaning of section 6(f) of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) § 46(f); and that such transmission in this case would not cause irreparable harm to plaintiff. *Ashland Oil Company* v. *F.T.C.*, U.S. App. D.C. , No. 76-1174 decided September 20, 1976, petition for rehearing denied, March 2, 1977.

ORDERED that Plaintiff's Motion for Partial Summary Judgment is, denied; and it is

FURTHER ORDERED that Defendants' Motion to Dismiss the Action is granted and this action be, and the same is hereby, dismissed with prejudice, and it is

FURTHER ORDERED that Plaintiff's Motion for a Preliminary Injunction is denied as moot, and it is

FURTHER ORDERED that plaintiff's request for a stay of this Order pending the filing of an appeal is denied.

/s/ JOHN H. PRATT
John H. Pratt
United States District
Judge

29 March 77

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1302

EXXON CORPORATION, APPELLANT

v.

FEDERAL TRADE COMMISSION, et al.

(Civil 76-0812)

No. 77-1303

KERR-MCGEE CORPORATION, APPELLANT

v.

FEDERAL TRADE COMMISSION, et al.

(Civil 76-0814)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 77-1304

UNION CARBIDE CORPORATION, APPELLANT

v.

FEDERAL TRADE COMMISSION, et al.

(Civil 76-0793)

Appeals from the United States District Court
for the District of Columbia

Argued February 13, 1978

Decided October 19, 1978

Roberts B. Owen, for appellant in No. 77-1302. Argued on behalf of all appellants.

J. Randolph Wilson and *Steven S. Rosenthal* were on the brief, for appellant in No. 77-1303.

James H. Wallace, Jr. and *Thomas C. Arthur* were on the brief, for appellant in No. 77-1304.

Gerard P. Norton, Acting General Counsel, Federal Trade Commission, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, and *Joel S. Perwin*, Assistant United States Attorneys, *Jerald D. Cummins*, Acting Assistant General Counsel, and *Arthur W. Adeloug*, Attorney, Federal Trade Commission, were on the brief, for appellees.

Michael Lemov was on the brief, for *Amicus Curiae*, Congressman John E. Moss, urging affirmance.

Before ROBINSON, MACKINNON and ROBB, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge:* Exxon appeals from the district court's refusal to grant injunctive or declaratory relief and from its subsequent denial of a stay pending appeal. At issue is whether any protective measures should be imposed on the Federal Trade Commission (hereafter the "Commission" or the "FTC") with respect to the divulgence to Congress of "trade secrets" obtained by it under the compulsion of a subpoena.[1] The controlling statute provides:

The [Federal Trade] Commission shall also have power—

* * * *

> (f) To make public from time to time such portions of the information obtained by it hereunder, *except trade secrets* and names of customers, as it shall deem expedient in the public interest . . .

15 U.S.C. § 46(f) (emphasis added). The parties do not dispute, nor could they after our decision in *Ashland Oil, Inc.* v. *FTC*, 548 F.2d 977 (D.C. Cir. 1976), that Congress has a right of access to such information, including trade secrets. The issue before us concerns solely the question of notice to parties prior to disclosure of their confidential information and of safeguards to ensure the continued confidentiality of such information once disclosed to the Congress.

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[1] There is no question that the information in question here qualifies under this court's definition of "confidential" information for purposes of the Freedom of Information Act, 5 U.S.C. § 552 (1970). In *National Parks and Conservation Assoc.* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), *rev'g* 351 F. Supp. 404

I

In 1975, pursuant to a subpoena, Exxon, Kerr-McGee, and Union Carbide made available to the Commission information relating to their ownership, operation of, and future expectations for their uranium holdings.[2] It is undisputed that some of this material involved trade secrets, particularly the data concerning the production and projected yield of individual mines. In April of 1976, in the course of considering S. 489, 94th Cong., 1st Sess., which proposed prohibiting oil companies from owning interests in fuel reserves other than oil and gas, Senator Hart wrote to the Commission on official stationery of the Senate Judiciary Subcommittee on Antitrust and Monopoly requesting the Commission to make available all information it had concerning the coal and uranium holdings of the oil companies.[3] The F.T.C., because of the relationship of its

(D.D.C. 1972) we stated that information will be considered confidential if its disclosure is likely to "cause substantial harm to the competitive position of the person from whom the information was obtained." Production forecasts such as are at question in this case would clearly cause such competitive harm were they disclosed to competitors. *See* JA 64 (Dickeman Affidavit for Exxon Co.); JA 73 (Zitting Affidavit for Kerr-McGee Co.); JA 78 (Thurber Affidavit for Union Carbide Co.). Trade Secrets and other confidential data are not immune to FTC investigation, *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 973 (10th Cir.), *cert. denied*, 354 U.S. 925 (1965). For the broad range of the Commission's subpoena power in general, *see, e.g., Menzies* v. *FTC*, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957); 12 Von Kalinowski, Trade Regulation § 86.06 (1977).

[2] Appellant Union Carbide also submitted, and sought to protect, data relating to its coal holdings. Government Brief at 2-3.

[3] Senator Hart at the time was Chairman of the Senate Subcommittee on Antitrust and Monopoly. He wrote to the FTC following receipt of a letter from Senator Abourezk, also a member of the Subcommittee on Antitrust and Monopoly. In his letter Senator Abourezk suggested that the information in the FTC's possession was "crucial" to the consideration of S. 489. JA 61.

functions to those of Congress, treats such congressional requests as compulsive, even though they lack the formal status of congressional subpoenas. However, the Commission had previously assured the companies in writing that in the event of any congressional request for confidential information (trade secrets), it would both advise the Members of Congress who submitted the request that the information should be considered confidential when received, and give the companies themselves ten days prior notice of disclosure, whenever such notice was "reasonably possible" (Government's Brief at 2-3).

In early May, the Commission notified appellants of the subcommittee's requests, and appellant Union Carbide quickly obtained a court order restraining the disclosure of the requested information until ten days after the decision in the then pending *Ashland Oil, Inc.* v. *F.T.C.* case. Shortly after the Union Carbide order was issued, the subcommittee forwarded a formal request for *immediate* access to the information, and the Commission informed the parties that it would disclose the data requested the following day, except insofar as protected by the court order obtained by Union Carbide. At this point, Kerr-McGee and Exxon also succeeded, despite only 23 hours advance notice, in obtaining a preliminary injunction barring disclosure until the decision in *Ashland Oil*.

Some months later, in September, 1976. in *Ashland Oil, Inc.* v. *F.T.C.*, 548 F.2d 977 (D.C. Cir. 1976) this court decided that it was permissible for the Commission to disclose confidential information to Congress.[4] The district

[4] *Ashland Oil* did not consider or determine the amount of notice the Commission might be required to give corporations whose trade secrets were to be divulged to Congress, or what steps the Commission should or could take to safeguard the confidentiality of these secrets once revealed to Congress. The question in *Ashland Oil* simply was whether or not the F.T.C. was authorized to divulge trade secrets at all, in light of 15

court thereupon dissolved the preliminary injunction granted to appellants, on the grounds that they were unlikely to succeed on the merits, as *Ashland Oil* had determined that disclosure to Congress did not constitute "public disclosure," and also that the companies were not threatened with irreparable injury.[5] The district court also denied appellants' request that the Commission be required to give ten days advance notice before revealing trade secrets to Congress. From this decision the appellants briefly obtained a stay pending appeal or until "further order of this Court,"[6] but this stay too was later vacated in light of *Ashland Oil*.[7]

Some of the information that the appellants sought to protect has already been disclosed, and this appeal is moot as to this material.[8] Other information, although vulnerable to disclosure whenever Congress may request it, remains undivulged.[9] As regards this information, and appellants' general request that the Commission be required to give ten days notice prior to disclosure, and that rea-

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U.S.C. § 46(f)'s prohibition against "making public" such secrets. Likewise *Ashland Oil* did not consider the issue of liability for damages resulting from the disclosure of trade secrets in violation of 15 U.S.C. § 46(f).

[5] JA 90.

[6] JA 92, Order of March 30, 1977.

[7] JA 96, Order of May 6, 1977.

[8] The information disclosed consisted of the data concerning Union Carbide's coal holdings.

[9] Senator Kennedy, the new Chairman of the Subcommittee on Antitrust and Monopoly expressed the continued interest of the Subcommittee in the information originally requested by the late Senator Hart by a letter of Judge Leventhal of this Circuit Court, dated April 13, 1977. Senator Moss, Chairman of the Senate Committee on Oversight and Investigation, by letter of April 19, 1977 to the Clerk of the United States Court of Appeals expressed a similar interest. The status of these letters in this proceeding is unclear since the record does not indicate the authority for their issuance.

sonable steps be required to ensure that Congress will keep such trade secrets confidential, the issues before us are not moot, and we resolve them here.[10]

It should be noted, however, that a large part of the questions raised by appellant while not moot, represent an attempt to have this court virtually engage in rulemaking for the FTC.[11] Our situation is somewhat analagous to those in which expansive conceptions of standing and ripeness have occasioned adjudications in which the courts have been cast in the inappropriate, and possibly *ultra vires*, role of attempting to resolve essentially abstract

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[10] If the FTC during the course of this appeal discloses the as yet undivulged information, this appeal will become moot as regards such information. However, appellant's request that the court issue a protective order requiring certain procedures to protect confidential data in the hands of the FTC when such data is requested by Congress will not itself be mooted by the disclosure of the information involved in this particular case. A suit for an injunction is not moot where the action which plaintiff seeks to enjoin may recur in the future. *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968); *see also, United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953). The FTC admits that it fully intends to hold open the option of disclosing trade secrets in the future without the safeguards sought by appellants. The fact that some issues in a case have become moot does not prevent a court from reviewing nonmooted issues where these are sufficiently significant that the cause of action remains justiciable, *e.g., Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1946); 6A J. Moore, Federal Practice § 57.13 at 57-121-125.

[11] Appellants assert (*see* Reply Brief for Appellant Exxon at 31-35) that the purpose of obtaining notice prior to disclosure is to have sufficient time to seek judicial review of the proposed divulgement. In this case, however, all appellants were able on very short notice to secure prior judicial review. Thus the fact pattern before this court is a particularly inappropriate one in which to evaluate the damage that might result if a company were unable to obtain judicial review before disclosure as the court does not have before it any evidence of the effect of such denial.

questions in reviewing agency regulations, *see e.g., ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part). In this case, appellants request this court to assume the inappropriate and potentially overreaching role of promulgating confidentiality guidelines for the Commission. We have, however, explicitly restricted our judgment in a previous case dealing with similar issues to the facts of that case, eschewing establishing any broad principle limiting the Commission's actions, *see FTC* v. *Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977) and we see no reason, nor any justification for doing otherwise in deciding this appeal.

II

Concerning appellants' prayer for a permanent injunction requiring ten days warning to affected parties before the FTC can disclose confidential data pursuant to congressional request, although we are very sympathetic to the need to protect the owners of valuable trade secrets, *e.g., Underwater Storage, Inc.*, v. *United States Rubber Co.*, 371 F.2d 950, 954 (D.C. Cir. 1966), *cert. denied*, 382 U.S. 911 (1967),—and would allow them to be disclosed only upon valid *formal* requests of Congress or its committees, *see* part V, *infra*—we consider, given no more basis for such an injunction than what is presented here, that no basis exists for us to inject the courts into what is only an incipient controversy.

The authority of the subcommittee to make a proper request for information of the nature that appellants seek to protect is not questioned. The disclosure was not to be used as "exposure for exposure's sake," *see Watkins* v. *United States*, 354 U.S. 178 (1957), and the subject of the subcommittee's inquiry was one "on which legislation could be had" and thus was a proper topic of Congressional

inquiry, *McGrain* v. *Daugherty*, 273 U.S. 135, 177 (1927); *Braden* v. *United States*, 272 F.2d 653 (5th Cir. 1959); *Sacher* v. *United States*, 252 F.2d 828 (D.C. Cir.), *rev'd on other grounds*, 356 U.S. 576 (1958). The material that the FTC proposed to divulge, then, was fully within the scope of the legislature's legitimate investigatory powers.

For this court on a continuing basis to mandate an enforced delay on the legitimate investigations of Congress whenever those inquiries touched on trade secrets could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality. While normally reasonable advance notice can be required, in exigent circumstances Congress has full authority to issue forthwith subpoenas and formally request immediate disclosure. To impose a mandatory notice period would skirt dangerously close to being at least the temporary "equivalent to an order quashing [the official request or subpoena] which is generally an impermissible frustration of the congressional power to investigate . . . and hence [would raise] serious constitutional issues," *United States* v. *American Tel. & Tel. Co.*, 551 F.2d 384, 388 (D.C. Cir. 1976), *citing, Eastland* v. *United States Servicemen's Funds*, 421 U.S. 491, 506 (1975). It would also abrogate the broad discretion of the Commission, *e.g., FTC* v. *Lonning*, 539 F.2d 202, 211 (D.C. Cir. 1976),—through which the FTC can make use of its considerable expertise to balance the private and public interests involved—to formulate its own reasonable confidentiality protections, *see FTC* v. *Anderson*, 442 F.Supp. 1118 (D.D.C. 1977).[12]

[12] The FTC argues that it would be without authority to resist forthwith subpoenas or formal requests for an immediate response, Brief for FTC at 20. Forthright subpoenas in the areas involved in these cases are certainly a rarity because of the time necessary to gather the information and the speed with which congressional committees function.

To impose any mandatory advance notice would run directly counter to the spirit expressed in *Eastland* v. *United Servicemen's Fund, supra:*

> This case illustrates vividly the harm that judicial interference may cause. A legislative inquiry has been frustrated for nearly five years, during which the Members and their aide [*sic*] have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry. The Clause [the Speech or Debate Clause] was written to prevent the need to be confronted by such "questioning" and to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority.

421 U.S. at 511.

The inquiry in *Eastland* differed from that in the present appeal,[13] but the decision's emphasis on the necessity for courts to refrain from interfering with or delaying the investigatory functions of Congress has an obvious relevance to appellants' demand that we impose a ten day delay on the FTC's compliance with any Congressional request for certain information.

Furthermore there is no indication that disclosure to the Subcommittee on Antitrust and Monopoly will in any way harm the appellants. We have heretofore held that release of information to the Congress does not constitute "public disclosure," *Ashland Oil, supra,* 548 F.2d at 979; *Exxon* v. *F.T.C.,* No. 76-0812 (D.D.C. March 29, 1977) at 1. Because such divulgement is not "public," it does not in itself impair the value of the trade secrets involved, and thus

[13] *Eastland* held that the subpoena of certain bank records from organizations being investigated as potentially harmful to the morale of the armed services was within the "leigitimate legislative sphere" and that the Speech or Debate Clause precluded judicial interference with congressional investigations within this sphere.

does not involve a deprivation prior to which a hearing is required. Thus, the protection of a judicial order, which mandating advance notice would require, is not necessary before such disclosure in order to accord with principles of due process, *see Roth* v. *Bd. of Regents,* 408 U.S. 564 (1972); *Perry* v. *Sinderman,* 408 U.S. 593 (1972). The courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties, *Ashland Oil* v. *FTC, supra,* 548 F.2d at 979, *quoting Ashland Oil* v. *FTC,* 409 F. Supp. 297, 308 (D.D.C. 1976); *see also, Safeway Stores, Inc.* v. *FTC,* 428 F. Supp. 346, 347 (D.D.C. 1977). In sum, we reaffirm our rationale in *Ashland Oil* that absent a showing that it is "evident" that Congress intends to make trade secrets divulged to it by the FTC publicly available, the Commission may, upon proper demand, release such secrets to the Congress without the necessity of prior notice to the parties involved, unless of course the Commission obtained such information upon an agreement to give prior notice to the party.[14]

[14] We thus decline to impose on the Commission either an unqualified ten day warning requirement or the more flexible alternative of mandating simply "reasonable prior notice." We have recently held in the specific context of congressional requests for confidential data from the F.T.C. that release to the Congressional Committee is not "public disclosure," *Ashland Oil* v. *F.T.C., supra.* Thus, such disclosure does not in itself injure appellants. Furthermore, as a general principle, judicial intervention to prevent potential injury from prospective government misconduct is only justified when such misconduct is imminent, not merely hypothetical, *Reporters' Committee for Freedom of the Press* v. *A.T.&T.,* No. 76-2057 (D.C. Cir. August 11, 1978) at 66, 76-77, citing *Rizzo* v. *Goode,* 423 U.S. 362 (1976); *Allee* v. *Medrano,* 416 U.S. 802 (1974); and *Laird* v. *Tatum,* 408 U.S. 1 (1972). To authorize such supervision as the appellants request would not only do violence to the presumption that congressional bodies will act responsibly, *Ashland Oil* v. *F.T.C., supra,* but also would place a significant impediment in the path of government investigations of important aspects of our economy.

Our decision in *FTC* v. *Texaco, Inc., supra*, 555 F.2d at 884 in which ten days notice was required by the court with respect to a specific request does not in any way conflict with our refusal here to order a similar general warning period. We do not interpret *Texaco* as authority for establishing such a period as a general requirement for FTC disclosure of trade secrets to Congress. In that case we explicitly stated:

> The Court is *not* herein adopting a rule of general applicability for a 10-day notice provision. It is rather adopting for purposes of this case a proposal for confidentiality *advanced by FTC*. . . .

555 F.2d at 884 n.64 (emphasis added). Clearly this court's decision to accept the F.T.C.'s own proposed settlement in a case which—as the district court noted[15]—was distinguishable on its facts from the present one, is not precedent for imposing a ten day rule in the situation before us now. Moreover, we also noted in *Texaco* that *F.C.C.* v. *Schreiber*, 381 U.S. 279, 295-296 (1965) made clear that "it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality," 555 F.2d at 884 n.62. The Commission has recently issued a notice of proposed rulemaking involving its protection of confidential information, 43 Fed. Reg. 3571 (January 26, 1978).[16] It would be completely inappropriate in light of our interpretation of the *Schreiber* case, and the view we take of our judicial authority, to interfere at this point and impose what in effect would be a general protective order upon the F.T.C., *see also, F.T.C.* v. *United*

[15] JA 84.

[16] The proposed rules provide that, in response to congressional requests for confidential data, "ten days notice shall be given *where possible*" (emphasis added), 43 Fed. Reg. 3574 (January 26, 1978). It would seem that the rule should provide that in all instances the party will be notified immediately whenever Congress makes a proper request for trade secrets.

States Pipe and Foundry Co., 304 F. Supp. 1254, 1260 (D.D.C. 1969); Gelhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 126 (1968).

III

Appellants' further contention that prior to disclosure the FTC should obtain assurances that confidential information will not be publicly disclosed unless a majority of the members of the committee or subcommittee vote to do so, deserves only perfunctory discussion. Again, we are sympathetic to appellants' concern for safeguarding highly confidential information worth millions of dollars, but for this court on this record to establish any such requirement would clearly involve an unacceptable judicial intrusion into the internal operations of Congress. Although the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members, *e.g., Yellin* v. *United States*, 374 U.S. 109, 143-144 (1963); *Watkins* v. *United States, supra; United States* v. *Ballin*, 144 U.S. 1, 5 (1892); *Jordan* v. *Hutcheson*, 323 F.2d 597 (4th Cir. 1963), where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress, *e.g., Consumers Union of the United States* v. *Periodical Correspondents Assoc.*, 365 F. Supp. 18, 24 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975); *Consumers Union of the United States* v. *Periodical Correspondents Assoc.*, 515 F.2d 1341, 1347-1348 (D.C. Cir. 1975). This court cannot assume that Congress will act irresponsibly in regulating or disclosing appellants' trade secrets. Barring the imminence of such disclosure, appellants' constitutional rights are not in fact jeopardized by delivery of their secrets to Congress. On this record there is no justification for this court to interfere with the operations of the legislative branch, *see, Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923); *Decatur* v. *Paulding*, 39 U.S.

(14 Pet.) 497 (1840); *Protestants and Other Americans for Separation of Church and State* v. *O'Brien*, 272 F.Supp. 712 (D.D.C. 1967).

It would exceed our jurisdiction for this court to require guarantees of specific congressional procedures in advance of any concrete threat to appellants' vital interests. The strong and long-standing principle of judicial abstention into the actions of the legislature demands that the courts, "avoid the possibility of unwarranted interference with a coordinate branch of government by requiring dismissal of applications [seeking to restrain congressional committees' use of information] not substantiated by a showing of need arising out of immediate threat to constitutional rights," *Cole* v. *McClellan*, 439 F.2d 534, 535-536 (D.C. Cir. 1970); *e.g.*, *Davis* v. *Ichord*, 442 F.2d 1207 (D.C. Cir. 1970). Courts should refrain from creating "needless friction" with a coordinate branch of government, *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 500 (1941); *Ansara* v. *Eastland*, 442 F.2d 751, 753 (D.C. Cir. 1971), and imposing a particular voting requirement to operate in the manner of a Congressional Rule, on the grounds that such a safeguard is necessary to ensure that Congress will act responsibly with secrets entrusted to it, is not only not refraining from, but actually provoking such "needless friction." The FTC and this court are compelled to rely on the assumption that Congressional committees will act responsibly with confidential data revealed to them, *Ansara* v. *Eastland*, *supra*, 442 F.2d at 754; *Ashland Oil* v. *F.T.C.*, 409F. Supp. 297, 308 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

If, in fact, a Member or congressional staff member improperly "leaks" confidential data, the injured parties have a recourse against that individual directly,[17] and the

[17] An official or employee of the Commission who makes an unauthorized public disclosure of confidential information may be guilty of a misdemeanor, *see* 16 C.F.R. § 4.10(c); *see also*, 12 Von Kalinowski, Trade Regulation § 89.04[2] at 89-33 (1977).

possibility of such action will serve to deter unjustified disclosure of trade secrets. Beyond provision for such suits, and in the absence of a concrete violation of law, rule or regulation, the courts are unable to aid the appellants in their request to oversee the activities of the legislature, allegations of the prevalence of "leaks" from some committees notwithstanding. The FTC should, and does, alert Congress when the information made available to it is confidential. In fact, some such cautionary statement could be impliedly required from the prohibition on the public disclosure of trade secrets imposed by 15 U.S.C. § 46(f). If the Commission failed to alert Congress to the fact that information being supplied to it was by statute prohibited from "public" disclosure the Commission would violate a duty implicitly imposed upon it by the statute. To impose further protective procedures upon Congress, without some immediate threat of illegal disclosure, would impermissibly interfere with the legislative branch—an action we refuse to take.

IV

Appellants also ask this court to require the FTC precisely to ascertain that the Congress specifically desires access to trade secrets, not merely more general (and less confidential) data, before it divulges such information. Of course, the FTC should not simply disclose trade secrets to Congress "sua sponte." The Commission, however, will invariably know the nature of the information in its possession far more accurately than Congress, and oftentimes may be aware of data clearly pertinent to an investigation of which Congress has no knowledge or intimation. We would not restrict the right, prior to congressional demand, of the Commission to discuss with Members of Congress or their staff the general nature of available data and thus use its expertise to inform the legislature of relevant in-

formation of which the Congress may often be unaware.[18] Barring some prohibition, governmental agencies may interchange information. Most problems in this connection will be obviated if the Commission merely notifies Congress whenever confidential trade secrets are requested or involved in potential delivery. In III, *ante*, we noted the obligation of the Commission to do this.

V

It is important to emphasize that our denial of appellants' requested injunctive and declaratory relief designed to limit the manner in which the F.T.C. may *respond* to a subpoena or formal request issued by Congress, does not address the question of when such a request or subpoena has been *properly issued.* While we are unable to agree with appellants' request for advance restrictions on the Commission's response to formal requests or subpoena, we feel that there is ample justification for insisting that the Commission only reveal statutorily protected *trade secrets* when it has indeed received such a proper request or subpoena.

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[18] Imposing a general restriction on the FTC's ability to assist Congress in the latter's investigations would be unjustified particularly in light of the fact that the Commission was formed in part to act as an arm of the legislature, assisting Congress in its investigations. A member of the Conference Committee on the bill that originally established the F.T.C., Congressman Stevens, explained that:

> [The Commission] has the power to investigate for the benefit of Congress. It really performs the functions of a committee of Congress in the line of investigation and compilations and recommendations. It can ascertain all the facts, as we constitutionally have the power to do, or we can commit that power to a Commission or to a committee to do that. That is what we do in this case. It is an especially valuable function, and its beneficial work will be along the line of recommendation to Congress and the President. 51 Cong. Rec. 14935 (1914).

There is no doubt that the subpoena power may be exercised on behalf of Congress by either House, *Eastland* v. *United Servicemen's Fund, supra; see* 2 U.S.C. § 190b(a) (1976); House Rule XI cl.2(A), and that the subpoenas issued by committees have the same authority as if they were issued by the entire House of Congress from which the committee is drawn, *e.g., In Re Motion to Quash Subpoenas and Vacate Service,* 146 F. Supp. 792, 794 (W.D. Pa. 1956). To issue a valid subpoena, however, a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers, and only those parties expressly authorized to sign subpoenas may do so validly. For example, where the resolution granting subpoena power to a committee stated that subpoena would be issued only by the whole committee, not even the Chairman himself could individually issue such a document, *Liveright* v. *United States,* 347 F.2d 473 (D.C. Cir. 1965); *see also, Shelton* v. *United States,* 327 F.2d 601 (D.C. Cir. 1963).

The resolution which in *Liveright* was held not to justify the Chairman's issuing a subpoena by himself is nearly identical to that of 2 U.S.C. § 190b(a) governing the subpoena power of Senate committees and subcommittees. The resolution specified that "the committee or any duly authorized subcommittee thereof is authorized . . . to require by subpoena." Whereas the statute states that "[e]ach standing committee of the Senate, including any subcommittee of any such committee is authorized . . . to require by subpoena or otherwise." The clear intent of 2 U.S.C. § 190b(a), is that only *committees* or *subcommittees* can issue subpoenas in the name of the committee or subcommittee, and *Liveright* indicates how narrowly the number of persons entitled to issue subpoenas is to be interpreted.

The purposes behind the limitation on the members of a committee or subcommittee who may issue subpoenas in

its name is illuminated by the House Rule on this subject:

> A Subpena may be authorized and issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of any investigation or series of investigations or activities, *only when authorized by a majority of the members voting, a majority being present.* The power to authorize and issue subpenas under subparagraph (1)(B) may be delegated to the chairman of the committee pursuant to such rules and under such limitations as the committee may prescribe. Authorized subpenas shall be signed by the chairman of the committee or by any member designated by the committee.

Rule XI cl. 2 (m)(2)(A) Manual and Rules of the House of Representatives, 95th Congress (emphasis added).[19] This rule is plainly directed at eliminating the possibility that an individual member of a committee will—solely on his own initiative—issue a "subpoena" compelling production of evidence, and a similar purpose can be discerned in 2 U.S.C. § 190b(a). The principle is important that disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members; and only for investigations and congressional activities. Election to the Congress does not give an individual subpoena power over whatever information be

[19] The reform rule adopted by the 94th Congress required subpoenas to be "authorized by a *majority of the members of the committee . . .*" *Id.*, cl. 2.(m) (emphasis added). *See Ashland Oil, Inc.*, v. *FTC*, 548 F.2d 977, 985-991 (D.C. Cir. 1976). The reform, however, was short lived, as the 95th Congress changed the rule to only require "a majority of the members voting, a majority being present."

The Senate rule authorizes "[e]ach standing committee . . . including any subcommittee of any such committee . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such . . . documents [etc.] . . . as it deems advisable." Rules and Manual of the United States Senate, 95th Congress, § 190b.(a), p. 363 (1977).

may happen to be interested in, and particularly not over trade secrets, whose oftentimes enormous value may be forfeited by disclosure to the public.

Although once a committee or subcommitte has in fact requested trade secret information, the separation of powers demands that the courts do little to interfere with how the Congress deals with this information; it is only when a formal committee or subcommittee request, or request by the committee chairman pursuant to an authorized investigation or activity, has been made that the doctrine of separation of powers becomes relevant at all. And as Congress itself has manifested a concern to prevent the issuance of subpoenas by individual members as opposed to committees, subcommittees or duly authorized committee chairmen, it is appropriate to require the FTC to take steps to ascertain the validity of a subpoena (or the formal requests it treats as subpoenas) before it releases data it is required by statute to be kept confidential.

Since the Freedom of Information Act makes a great deal of information available to the public and the FTC may volunteer certain *ordinary information* without any formal request, there does not seem to be any need for requiring the F.T.C. to determine whether or not a request for such information is in fact a proper formal request or subpoena. However, *trade secrets* are explicitly excluded from that material which the Commission may in its good discretion "make public." 15 U.S.C. § 46(f), *supra. See Bristol-Meyers Co.* v. *FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). We thus note that Congress intended to prohibit the FTC from disclosing "trade secrets" and cannot therefore assume that it meant to allow divulgement of these secrets upon the casual request of individual Congressmen.[20] Accordingly, although we do not require the

[20] We note that, in another context, Congress has manifested its solicitude to protect the interests of those individuals who are forced to entrust confidential data to agencies, *see, e.g.*, H.R.

FTC to observe the procedures proposed by the appellants to limit the manner in which the Commission responds to *formal requests* for trade secrets from Congress or its committees it is nothing more than common sense for the FTC to not disclose trade secrets except upon legally authorized requests therefor and to verify that fact before delivery. Trade secrets, by statute, are in a different position than ordinary non-confidential information within the possession of the Commission.

In this particular appeal, it does not clearly appear that the request sent to the FTC by Senator Hart was a "formal request" authorized by the Subcommittee. The Commission, however, may have been previously informed of subcommittee action that satisfied the necessary formalities. The Senate rules empowered the Chairman of the Subcommittee on Anti-Trust and Monopoly to issue subpoenas for proper purposes authorized by the subcommittee, and the requests presented to the FTC in this case were signed by Senator Hart, on official stationery and asked that "the Commission make available to the *Subcommittee* that data which it has gathered on coal and uranium reserves." (Emphasis added). When the Commission receives such a letter and it has knowledge that said investigation has been duly authorized, it is reasonable of it to treat it as an authorized formal request. Had Senator Hart himself written in a capacity other than that of Subcommittee Chairman, or had some other senator on the committee requested the confidential data, however, the statutory protection due to confidential trade secrets in the hands of the Commission, *see* 15 U.S.C. § 46(f); *FTC* v. *Texaco, Inc., supra*, 517 at 151, demands that it not release such sensitive information

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Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966) (a report on the bill that became the Freedom of Information Act of 1967); *see generally*, Note, Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 NW.U.L.REV. 995 (1976).

without verifying that the request satisfies the requirements of the controlling congressional rule.

VI

As a final point, the fact that appellants are appealing from the district court's refusal to grant equitable relief places an exceptionally heavy burden on them if they are to succeed before this court. Not only does an appeal from a denial of injunctive relief require a showing that the trial court abused its discretion, *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 112 (1962); *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944); *Meredith* v. *City of Winter Haven*, 320 U.S. 228, 235 (1943); *Independent Bankers Assoc. of America* v. *Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976), but also the burden on these particular appellants is considerably heightened by the clear public interest in maximizing the effectiveness of the investigatory powers of Congress. The welfare of the public is a factor to be weighed in determining whether or not to issue an injunction, *e.g.*, *Yakus* v. *United States*, 321 U.S. 414 (1944); *Hecht Co.* v. *Bowles, supra; Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933); *United States* v. *American Tobacco Co.*, 221 U.S. 10 (1911), and the investigatory power is one that the courts have long perceived as essential to the successful discharge of the legislative responsibilities of Congress, *McGrain* v. *Daugherty, supra.*

It would, then, require an extremely strong showing by the appellants to succeed in obtaining an injunction in light of the compelling public interest in denying such relief. Furthermore, there is no significant private injury present here to weigh against the public interest in unimpeded congressional investigation, *see Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1928); 7 J. MOORE, FEDERAL PRACTICE ¶ 65.18[3] at 65-138. Given the presumption of congressional propriety discussed above, *see*

also, Ansara v. *Eastland, supra*—there is no risk of imminent injury to appellants. Injunctions, however, will not issue to prevent injuries neither extant nor presently threatened, but only merely "feared," *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931). To grant the injunction appellants request, this court would be required to interfere with the operation of Congress, and also to depart from traditional doctrine concerning the availability of equitable relief. Finding no justification for granting the relief requested by appellants, we affirm the judgment of the district court in its entirety.

Judgment accordingly.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 77-1302

EXXON CORPORATION,

Appellant

v.

FEDERAL TRADE COMMISSION, et al.

And Consolidated Case Nos. 77-1303 and 77-1304

BEFORE: Robinson, MacKinnon, and Robb;
Circuit Judges

Order

Filed Dec. 6, 1978

Upon consideration of the petition for rehearing filed by appellant, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 77-1302

EXXON CORPORATION,

Appellant

v.

FEDERAL TRADE COMMISSION, et al.

And Consolidated Case Nos. 77-1303 and 77-1304

BEFORE: Wright, Chief Judge; Bazelon, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

Order

Filed Dec. 6, 1978

Upon consideration of the suggestion for rehearing *en banc* filed by appellant Exxon Corporation, and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Judge Bazelon votes to rehear this case *en banc* to consider the important questions this case raises under *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975).

Statement of Circuit Judge Wilkey as to why he voted for rehearing *en banc* is attached hereto.

No. 77-1302 EXXON CORPORATION, et al. v. FEDERAL TRADE COMMISSION, et al.

Statement of Circuit Judge Wilkey as to why he voted for rehearing en banc:

As a preliminary matter, it should be noted that not all judges of this court were able to vote on the question of rehearing *en banc* because of necessary recusals. This is somewhat comparable to our previous case of *Federal Trade Commission* v. *Texaco, Inc.*, 555 F.2d 862 (D.C. Cir., *en banc*), *cert. denied*, 431 U.S. 974 (1977), in which only six of the nine members of the Court were able to participate, and which resulted in a 4-2 decision on a related matter of Federal Trade Commission subpoenas to the petroleum industry. In my view, the necessary disqualification of judges produces a thoroughly unsatisfactory situation, either for the preliminary voting for rehearing *en banc* or for the determination of any important issue. Obviously, the Supreme Court cannot grant certiorari on all cases in which the full Circuit was unable to participate, although this might be an additional factor commending the case for certiorari review.

On the merits of the panel's decision here, I am quite perplexed at the logic of the result reached. The court correctly states, "The issue before us *concerns solely the question of notice to parties prior to disclosure* of their confidential information and of safeguards to insure the continued confidentiality of such information once it is disclosed to the Congress." (Slip op. 4) The issue in this particular case is thus not whether these particular documents *should* be disclosed to the Congressional committee, but whether the private parties who furnished the documents to the agency on a pledge of confidentiality should have *notice* of the planned disclosure of the documents before all rights of confidentiality in those documents are mooted by the disclosure itself.

It appears implicit in the panel's opinion (slip op. 8, 16-21) that the court holds that the private parties *do* have a right to judicial review of the request prior to disclosure, thus to avoid irretrievably mooting the question of confidentiality, yet strangely the court winds up holding that the agency need not give the private party any advance notice of a proposed disclosure—a holding which thus effectively precludes any judicial review of the legal issue of whether disclosure is proper. The panel thus recognizes the private parties' substantive and procedural rights, but simultaneously renders them totally unenforceable and meaningless.

This is not a problem which involves oil companies only. The rule laid down by the panel is a general rule on the authority of Congressional committees to request and obtain from any federal agency confidential information furnished to it by a private party. This rule permitting disclosure without any notice whatsoever is equally applicable to all kinds of information protected from disclosure by anyone of numerous constitutional and statutory provisions. Congress' and the courts' oft expressed concern for privacy, for example, would be completely vitiated by this general rule.

While the panel's decision discusses *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), it nowhere confronts the holding of *Eastland* that where a Congressional subpoena has been issued for information relating to a private party, but which is in the possession of another entity, the affected private party has an affirmative right to judicial review of the Congressional request *before* disclosure is made. 421 U.S. at 496 n.9, and 501 n.14. Under the panel's strange rationale, while the right to judicial review of the propriety of the Congressional action is recognized, just as it was in *Eastland*, the panel destroys the right to the judicial review it recognizes and which was granted in *Eastland* by its illogical holding that *the private*

party affected has no right to notice which would enable him to seek judicial review.

This ruling applies to more than the trade secret documents of oil companies. It strikes down the protection of judicial review where constitutional rights are affected. It should not stand.